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C O N F I D E N T I A L SECTION 01 OF 02 PRETORIA 000191

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TAGS: [PGOV](#) [SF](#)

SUBJECT: CONSTITUTION QUIET ON PRESIDENTIAL IMMUNITY

REF: A. 07 PRETORIA 4262

[1](#)B. PRETORIA 0066

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Classified By: Deputy Chief of Mission Donald Teitelbaum. Reasons 1.4(b) and (d).

[1](#)1. (C) SUMMARY: The fact that ANC President Jacob Zuma's upcoming corruption trial (Ref A) is likely to span over two presidential terms is giving rise to questions of presidential immunity. Views are mixed, as neither the Constitution nor domestic law explicitly address the question. Retired professor Marinus Wiechers, one of the authors of the Constitution, maintains that sitting presidents are not immune from prosecution and reports that the drafters specifically debated whether to include an immunity provision and decided against it. Raenette Taljaard, Director of the Helen Suzman Foundation, agrees and notes that former President Nelson Mandela set the precedent by testifying before the Pretoria High Court while in office. On the other hand, UNISA Professor Dirk Kotze argues that the Constitution's silence on the immunity question leaves the issue open for debate. In practical terms, the lack of an explicit presidential immunity provision means the timing of the Zuma corruption case is everything. Should Zuma's trial overlap the parliamentary elections, South Africa's future leadership may be determined by a legal cliffhanger that has never been litigated in a South African court. END SUMMARY.

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CONSTITUTION QUIET ON PRESIDENTIAL IMMUNITY  
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[1](#)2. (C) PolOff and DepEconCouns met on 24 January with retired constitutional law expert Marinus Wiechers, one of the authors of the South African Constitution, to discuss presidential immunity in the event current ANC President Jacob Zuma were to be elected South African President while still on trial for corruption and fraud. According to Wiechers, sitting presidents do not have immunity from prosecution within South African courts. "This was specifically discussed in Kempton Park," he said, and it was decided "absolutely not, because no man should be above the law." Wiechers explained that in theory, a sitting president suspected of a crime should be charged, then tried in a court of law. If found guilty, s/he should then be removed as President by a two-thirds majority vote of National Assembly members under Article 89 of the Constitution on the grounds

of breach of South African law and/or inability to perform the functions of the office.

¶3. (C) Helen Suzman Foundation Director and former Member of Parliament Raenette Taljaard separately echoed Wiechers assessment in a 22 January meeting with PolOff. She observed that the lack of immunity means Zuma could follow through on his threat to call President Mbeki to the stand during Zuma's upcoming corruption trial. Press reports in 2006 noted that Zuma's legal defense team was prepared to subpoena Mbeki to answer questions about how much he knew about the underlying arms deal and about a letter signed by Zuma which lambasted Parliament's planned investigation into it. Taljaard also argued that former President Mandela "ensured Mbeki would have to testify if ever called when Mandela took the stand in the famous SARFU case." (BACKGROUND NOTE: In 1998, Mandela testified before the Pretoria High Court about his decision to order a probe into allegations that South African rugby was corrupt, racist, and nepotistic in response to a summons Qwas corrupt, racist, and nepotistic in response to a summons by the South African Rugby and Football Union's (SARFU) legal team. END NOTE) "I'm sure Mbeki does not believe that Zuma will do it, but then again, Mbeki has consistently underestimated Zuma at every turn," Taljaard said.

¶4. (C) UNISA Professor Dirk Kotze told PolOff on 28 January that the fact the Constitution is "quiet" on the presidential immunity issue leaves the question open for debate. He said that Zuma could argue that many countries offer presidential immunity and that there is an historical principle that those in charge of public affairs should have legal protection as a means of protecting the office -- not necessarily the politician -- and the separation of powers. Kotze also cited the 2002 case of Belgium versus the Democratic Republic of Congo in the International Court of Justice, which decided that Congo's Minister of Foreign Affairs could not be tried in Belgium for crimes against humanity because incumbent Ministers of Foreign Affairs are immune from criminal suits

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abroad. (COMMENT: While interesting, this case only addresses the question of immunity from foreign prosecution -- domestic prosecution remains an issue of domestic law/precedent.)

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ZUMA LIKELY TO BE CONVICTED...  
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¶5. (C) Wiechers told EmbOffs he firmly believes Zuma will be tried and convicted of corruption. Wiechers does not believe Zuma's legal team has any chance of winning their argument that Zuma is unable to receive a fair trial. Since South Africa does not have a jury system, the only way to convince the court is to argue that the state has acted outrageously or abused its power. In Wiechers' view, "the state has not overstepped its bounds and most of the evidence, which is overwhelming, stems directly from the Shaik case and has already been declared legal by the justice system."

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...BUT TIMING IS EVERYTHING  
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¶6. (C) If the National Assembly were to elect Zuma President, and he subsequently is convicted on the corruption, racketeering, money laundering and fraud charges, Wiechers believes Zuma still would have options, since the Article 89 presidential removal provisions are not obligatory. "Theoretically, Zuma could be elected, convicted, go to jail, and still run the country. Or he could appoint next in line, the Deputy President, as Acting President," he said. Wiechers also speculated that the National Assembly could remove Zuma, elect a new president who could pardon Zuma and then immediately step down to allow the National Assembly to reelect Zuma as President.

Ironically, the only certainty is that a conviction would require Zuma to give up his ANC Presidency, since the ANC Constitution states that one cannot be convicted and hold party office. However, Professor Kotze does not believe that the ANC would allow the situation to deteriorate substantially. Kotze told PolOff that the ANC understands the gravity of the situation and is grooming ANC Deputy President Motlanthe to become national president if Zuma cannot.

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COMMENT  
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17. (C) With the 08 January NEC statement indicating that "the ANC President" will be the ANC's candidate for national President in the 2009 parliamentary elections (Ref B), analysts have already started gaming out Zuma's potential paths. Since the corruption case against Zuma is scheduled to start in August, the timing of the Pietermaritzburg High Court's eventual decision becomes critical. If Zuma is convicted before the 2009 parliamentary elections, presidential immunity is a moot point. If, however, the case drags on through the December/January court recess into the March/April election timeframe, the obscure and ill-defined question of immunity may become central to determining who South Africa's next president will be.  
BOST